Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO *and* Pepsi-Cola Newburgh Bottling Company, Inc. Case 2–CB–12932

August 19, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 27, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The General Counsel excepts, inter alia, to the judge's dismissal of the complaint's allegation that the Respondent violated Section 8(b)(1)(A) of the Act when striking employee Tony Yannucci attempted to injure nonstriking employee Brian Cutler outside a supermarket in Middletown, New York. The judge impliedly credited driver Brian Cutler's testimony that he was unloading his truck in a parking lot when 10 or more steel ball bearings began flying at him, hitting the truck and its merchandise. According to Cutler, the police were called and Cutler saw the police take steel ball bearings and a wrist rocket slingshot from Yannucci's vehicle.[4] Relying on his interpretation of *Teamsters Local 783 (Coca-Cola Bottling Co.)*, 160 NLRB 1776 (1966), and the lack of evidence establishing the Respondent's knowledge of Yannucci's misconduct away from the picket line, the judge recommended dismissal of this allegation.

As a general proposition, the judge is correct that a union will not be held liable for striker misconduct that occurs away from the picket line unless there is a showing of knowledge of that specific misdeed. In this case, however, the Respondent had previously been made aware that Yannucci had engaged in misconduct away from the picket line and had failed to repudiate it or take steps to stop his misconduct from recurring.

Briefly, as found by the judge, in July and August, striker Dennis Freeman assigned other strikers to follow company trucks. In mid-July, as driver Carli was returning to the facility, Yannucci repeatedly drove his vehicle in front of Carli's truck and repeatedly braked it in a manner that almost caused an accident. Business Agent Russo was made aware of the incident when Carli confronted Yannucci about it back at the picket line. Russo then told Yannucci not to talk to Carli and went on to advise the picketers that Carli was the one ''they were supposed to get.'' Thus, the Respondent knew of this specific act of misconduct and did not disavow it. Indeed, the Respondent approved and encouraged such misconduct against CARLI. As noted above, Yannucci later engaged in the misconduct of projecting steel ball bearings at nonstriker Cutler. Concededly, this misconduct was aimed at a different employee and involved a different form of coercion. However, these differences do not absolve the Respondent of responsibility. The message from the Respondent to Yannucci was clear: coercive acts against nonstrikers are condoned and even encouraged. Yannucci acted on this message and thus the Respondent is clearly responsible therefor. We therefore find that through Yannucci's shooting the metal balls at the

[1] The Respondent has excepted, inter alia, to the judge's finding that the Respondent violated Sec. 8(b)(1)(A) of the Act when a picketer deposited nails (jack rocks) at the plant gate that became imbedded in a company truck's tire. The Respondent contends that driver David Jados' testimony on this matter is hearsay and that he never really saw what was in the tire. On the contrary, the credited testimony of Jados is that on August 9 or 10, as he and his supervisor were returning to the facility, they were stopped by 20 to 30 picketers on the line. As they inched their way into the driveway, they were stopped again. When they finally got through the crowd of picketers, someone in the truck behind them told them something had been thrown underneath their truck. After parking the truck, according to Jados, they ''looked and found a jack rock imbedded in the passenger rear wheel of the trailer.'' The statement by someone in the other truck that something was thrown under the truck was hearsay. However, it was not offered for the truth of the statement, but was offered only to show what happened next, i.e., what prompted Jados to look under the truck. Therefore, the judge properly overruled the Respondent's objection to Jados' testimony concerning the statement made by someone in the other truck. Further, the judge reasonably inferred from the strong circumstantial evidence that one of the picketers threw the jack rock under the truck.

[2] We agree with the judge's findings that picketer Schneider's statement to driver Mangus that he was ''going to send you all home in body bags,'' Schneider's pulling of a gun on Mangus, and Business Agent Russo's statement to driver Carli in July that ''they were going to put [him] in a body bag and send [him] home and that there was no way [he] was going to live through the strike'' all violated Sec. 8(b)(1)(A) of the Act. We find that these statements and action–-for which the Respondent was responsible–-constituted threats to physically injure and threats to kill and we will modify the recommended Order accordingly.

In concluding that the Respondent was not responsible for the conduct of Schneider, our dissenting colleague asserts that the Respondent, after the incident involving Schneider, took steps to remove him from the picket line. In our view, quite apart from whether such a removal would absolve the Respondent from responsibility, there is no record evidence that the Respondent took such steps. There is only the evidence that Schneider did not reappear at the picket line.

[3] The General Counsel excepts to the judge's failure to discuss or pass on various complaint allegations that the Respondent violated Sec. 8(b)(1)(A) by threatening to kill and threatening to physically injure various persons. Although the Board does not condone the judge's total failure to address certain issues raised in the complaint and fully litigated at trial, a remand would only unduly delay these proceedings for findings that would be cumulative and would not materially alter the recommended Order. We have, however, modified the Order to include, as sought by the General Counsel, proscriptions on threats to kill and threats to injure based on the violations already found. We, therefore, find it unnecessary to pass on the complaint allegations that the judge failed to address.

[4] Cutler's testimony establishes that Yannucci was in fact responsible for propelling the steel balls.

truck and its contents, the Respondent violated Section 8(b)(1)(A) of the Act.

The Respondent has also excepted to what it perceived as the judge's finding that the Respondent had violated the Act by stationing a video camera across the street from the plant and directing it at the main gate for a 4- to 5-week period. The Respondent contends that, as the Employer had a video camera on the premises to record the events as they occurred 7 days a week, for 4 to 12 hours a day, it was also proper for the Union to have a video record. The judge discussed this video recording in the context of his discussion of picketers recording license plate numbers and of a picketer on the line with a camera with a telephoto lens photographing employees as they entered and exited the building. A close reading of the judge's actual finding of a violation reveals, however, that the judge did not include the Respondent's video recording as a violation. It was only the picketers' conduct in recording license plate numbers and the use of the telephoto lens to photograph employees entering and exiting the building that he concluded constituted a violation of the Act. We adopt this conclusion.

We also adopt the remedial relief recommended by the judge, except that we shall alter the provision requiring the Respondent to cease and desist from violating employee rights ''in any like or related manner'' to ''in any other manner.'' In our view the Respondent has shown a proclivity to violate the Act and a general disregard for employees' fundamental statutory rights and therefore we shall impose a broad order. See *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Soft Drink Workers Union Local 812, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Scarsdale, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Restraining or coercing employees of *Pepsi-Cola Newburgh Bottling Company, Inc*., in the exercise of their rights under Section 7 of the Act by throwing rocks, displaying guns, blocking ingress and egress, physically threatening and spitting at employees, recording license numbers and photographing employees, placing nails in front of vehicles, damaging employees' vehicles, throwing liquid at employees, dangerously interfering with the driving of employees, threatening to physically injure employees, and threatening to kill employees.''

2. Substitute the following for paragraph 1(b).

''(b) In any other manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, concurring in part and dissenting in part.

I agree with my colleagues' conclusion that the Respondent violated Section 8(b)(1)(A) through the numerous incidents of misconduct engaged in by employees and the Respondent's representatives on the picket line.[1] In reaching this conclusion, however, I find it unnecessary to pass on the judge's and my colleagues' reliance on vis *Rent-a-Car*, 280 NLRB 580 (1986).

In determining union liability for picket line misconduct, the Board as traditionally applied general principles of agency law and found the union liable ''only where it is shown that the union, either actually or impliedly, authorized the picket's conduct beforehand or ratified the conduct after it occurred.'' *Delta Lines*, supra at 993, 994. Thus, the Board has found a violation where a union representative participated in the misconduct, was present when it occurred, or had knowledge of the misconduct but failed to take steps reasonable calculated to control it. Id. I find that the Respondent was liable under this standard for the misconduct that occurred on the picket line here, without regard to the more far-reaching approach to union liability articulated in the Board's dicta in *Avis*.

The 14 incidents of picket line misconduct at issue here, excluding Schneider's display of a gun, took place between early July and late October 1989. The judge found that one or more representatives of the Respondent, including President Rumore and Business Agents Russo and Vitta, were present for or participated in at least six of these incidents. Thus the Respondent's agents personally engaged in or witnessed misconduct involving throwing liquid at a driver, throwing rocks at the Company's facility, blocking in-

[1] I agree that Business Agent Russo's statement to driver Carli constitutes a threat to kill and by that statement the Respondent violated Sec. 8(b)(1)(A). Contrary to my colleagues, however, I would not find that the Respondent violated Sec. 8(b)(1)(A) through picketer Schneider's conduct. In its exceptions the Respondent contends, inter alia, that it took action by keeping Schneider off the picket line after it became aware of this incident. I find merit in the Respondent's exception. The judge found that after the date of the incident Schneider was no longer on the picket line, in contrast to his previous daily presence. The judge noted in finding the violation, however, that Schneider continued to come to the Respondent's camper several times weekly, and that there was no evidence that he had been reprimanded or disciplined by the Respondent. I find that by removing Schneider from the picket line following his misconduct the Respondent took steps reasonably calculated to control the misconduct. *Teamsters Local 60 (Delta Lines)*, 229 NLRB 993, 994 (1977). Therefore, I conclude that Schneider's actions did not constitute a violation of Sec. 8(b)(1)(A).

I note that no exceptions have been filed to the judge's conclusions that the Respondent unlawfully photographed employees using a telephoto lens and recorded employees' license numbers. In view of these violations, I find it unnecessary to determine whether the judge also found the Respondent's videotaping of employees unlawful, because such an additional violation would be cumulative and would not materially affect the Order.

gress and egress at the front gate, threatening a nonstriking employee, threatening to assault a security guard, and spitting at employees. It is clear that the Respondent is liable for the actions of its own agents, as well as for misconduct by other picketers while its agents stood by. I therefore agree with my colleagues that by each of the above acts of misconduct the Respondent violated Section 8(b)(1)(A).

I further find that under the circumstances of this case the Respondent is liable for other acts of misconduct, even though its agents may not have been present on the picket line itself when misconduct occurred. This misconduct includes additional incidents of the types found unlawful above, as well as other violations found by the judge involving recording license plate numbers of nonstriking employees, photographing employees entering and leaving the Company's facility, throwing nails under a company truck, and damaging vehicles.

In this regard, the record in this case clearly indicates that, even if Business Agents Vitta and Russo did not witness or specifically authorize each incident of misconduct, they had reason to know of this pattern of behavior at the picket line and took no action to prevent it. Thus, the judge found Business Agents Vitta and Russo supervised the picket line daily, and that each was at the Company's facility approximately 12 hours per day. Although the business agents spent much of this time in the Respondent's camper, the camper was located directly at the picket site. I find that because of their proximity to the picket line, Vitta and Russo could not reasonably have been unaware of the picketers' actions. The incidents at issue here were not isolated events; rather, 12 of the 14 incidents took place in relatively close succession during the months of July an August. Moreover, the agents themselves, as well as the Respondent's president, repeatedly participated in or witnessed misconduct, beginning with the first occurrence at issue and extending until August 31. Far from attempting to control the picketers' actions, the agents, by their participation, promoted the misconduct of others. Therefore, based on the daily presence of the Respondent's agents at the picket site with responsibility to supervise the picket line, their personal participation in unlawful conduct, the closeness in time of the repeated misconduct by picketers, and the failure of the agents to take steps to prevent the recurrence of such incidents, I find that the Respondent violated Section 8(b)(1)(A) by each of these additional acts of misconduct. See *Dover Corp.*, 211 NLRB 955, 956–957 (1974); *Teamsters Local 810 (Russell Plastics)*, 235 NLRB 40, 46 (1978).[2]

[2] I agree with my colleagues' adoption of the judge's conclusion that the Respondent also violated Sec. 8(b)(1)(A) through misconduct away from the picket line when employee Yannucci interfered in a dangerous manner with the driving of employee Carli. Contrary to my colleagues, however, I agree with the judge's dismissal of the allegation concerning Yannucci's subsequent misconduct involving the shooting of metal balls at driver Cutler in a supermarket parking lot because, as found by the judge, the evidence does not show that the Respondent knew of or later became aware of that incident.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce employees of Pepsi-Cola Newburgh Bottling Company, Inc., in the exercise of their rights under Section 7 of the National Labor Relations Act, by engaging in the following activities:

1. Blocking entrance to or exit from the facility of Pepsi-Cola Newburgh Bottling Company, Inc.
2. Throwing rocks, displaying guns, physically threatening employees, or spitting at employees.
3. Placing nails in front of vehicles, damaging employees' vehicles, throwing liquid at employees, and interfering in a dangerous manner with the driving of employees.
4. Recording license numbers of employees' vehicles and photographing employees who cross the picket line.
5. Threatening to physically injure employees or threatening to kill employees.

WE WILL NOT in any other manner restrain or coerce employees of Pepsi-Cola Newburgh Bottling Company, Inc., in the exercise of their rights under Section 7 of the National Labor Relations Act.

SOFT DRINK WORKERS UNION LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO

Richard L. DeSteno, Esq., for the General Counsel.
Sidney Fox, Esq. (Shapiro Shiff, Beilly, Rosenberg & Fox), of New York, New York, for the Respondent.
Howard G. Estock, Esq. (Clifton, Budd & DeMaria), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York, on November 13–16 and 20–21, 1989.[1] On a charge filed on August 11,

[1] All dates refer to 1989 unless otherwise specified.

a complaint was issued on September 25, alleging that Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Respondent or the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

On January 3, 1990, counsel for Respondent filed a motion to reopen the hearing for the submission of evidence relating to the dismissal of charges against certain union members. On February 13, 1990, the hearing was reopened for the sole purpose of admitting into evidence the certificates of dismissal and related documents.[2]

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by General Counsel and by Respondent on March 8 and 9, 1990, respectively.

On the entire record of the case,[3] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Pepsi-Cola Newburgh Bottling Company, Inc. (the Company), a New York corporation, with an office and place of business in Newburgh, New York, is engaged in the business of the bottling and nonretail distribution of soft drinks. Respondent admits, and I find, that the Company annually purchases and receives at its facility products and materials valued in excess of $50,000 directly from points located outside the State of New York. Respondent also admits, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Company operates a soft drink bottling facility in Newburgh, New York. It sells and delivers various soft drinks to supermarkets and other retail outlets. The Company and the Union have been parties to a series of collective-bargaining agreements. After the parties were unable to reach agreement on a contract to succeed the one which expired on July 3, 1989, the Union called a strike on July 4 and promptly commenced picketing the Company's facility. Shortly after the strike began the Union stationed its recreational vehicle (the camper) behind the facility. Union officials have maintained a daily presence at the facility. This proceeding involves numerous allegations that the Union violated Section 8(b)(1)(A) of the Act from July through October 1989 as a result of misconduct occurring at the picket line and at locations away from the picket line.

[2] The certificates of dismissal and related documents were admitted into evidence as ALJ Exh. 2.

[3] General Counsel's motion to correct transcript is hereby granted.

2. Applicable legal principles

In *Teamsters Local 860 (Delta Lines)*, 229 NLRB 993, 994 (1977), the Board succinctly stated the applicable principles of when picketers' activities are attributed to the union:

> In determining whether a union is responsible for the misconduct of persons engaged in picketing, the Board applies the ''ordinary law of agency.'' The Board will, in applying these agency principles, impute the conduct of the union's pickets to the union only where it is shown that the union, either actually or impliedly, authorized the picket's conduct beforehand or ratified the conduct after it occurred. For example, where an authorized union representative such as a union official or picket captain participates in picketing misconduct or is present at the time the misconduct occurs, the Board will not hesitate to find that the union is responsible. Similarly, where the union has knowledge of its pickets' misconduct, but fails to take steps ''reasonably calculated'' to control that misconduct, the Board readily imputes responsibility for the misconduct to the union.

See also *Laborers Local 721 (Crouse Nuclear)*, 256 NLRB 195, 200 (1981).

More recently, in *Avis Rent-a-Car System*, 280 NLRB 580 fn. 3 (1986), the Board stated the following with respect to the responsibility of a union for the misconduct of its pickets:

> When a union authorizes a picket line, ''it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct.''

The Board further stated (ibid.):

> A union is responsible for the acts of its authorized pickets even if not specifically authorized or indeed specifically forbidden. Nor is it necessary to establish the identity of the picket engaging in the misconduct . . . . We find the Union had an affirmative obligation to control the actions of the unidentified picket, and cannot escape responsibility by simply contending that neither Business Agent . . . nor picket captain . . . was present when the misconduct occurred.

In *Dover Corp.*, 211 NLRB 955, 957 fn. 3 (1974), enfd. as modified, 535 F.2d 1205 (10th Cir. 1976), cert. denied 429 U.S. 978 (1976), the Board stated:

> [l]n instances where there have been repeated outbreaks of misconduct not participated in or even observed by the union but the union has failed to take steps to halt further outbreaks of such misconduct, union liability has been found.

3. The complaint allegations

a. *Preliminary considerations*

Paragraph 6 of the complaint contains the allegations of misconduct. At the hearing the complaint was amended to in-

clude additional allegations constituting paragraphs 6(bb) through 6(ii). At the conclusion of the hearing General Counsel moved to withdraw paragraphs 6(n), 6(x), and 6(dd). The Charging Party objected to the withdrawal of paragraphs 6(n) and 6(x) and decision was reserved. The motion to withdraw paragraph 6(dd) was granted. Inasmuch as I find insufficient evidence in the record to sustain the allegations in paragraphs 6(n) and (x), General Counsel's motion to withdraw those allegations is likewise granted.

The Union's business agent, Joseph Vitta, testified, and I so find, that he ran the strike at the facility and supervised the picket line on a daily basis. He testified that he shared equal responsibility with John Russo, also a union business agent, and that each of them was at the facility approximately 12 hours per day.

b. *Throwing of rocks and eggs*

The Company's vice president for sales and marketing, Thomas Strahle, credibly testified that on the evening of July 14 a large crowd of individuals, including strikers, gathered outside the plant. The Union's president, Anthony Rumore, was present. While the crowd was there rocks were thrown at the facility. While Strahle testified that he did not see who threw the rocks, under *Avis*, supra, it is not necessary to establish the identity of the picket engaging in the misconduct. I find that the rock throwing constituted misconduct within the meaning of Section 8(b)(1)(A) of the Act. See *Lumber Workers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809, 813–814 (1985).

Paragraph 6(c) of the complaint alleges that on July 24 Respondent's agents threw rocks and eggs at nonstriking employees. Jeffrey Carli testified that as he approached the plant at around 8:30 or 9 p.m., when it was ''starting to get dark,'' two or three individuals were throwing eggs and rocks from the hill behind the plant. When he was asked whether he knew who these individuals were, he testified ''they looked rather familiar as some of the strikers, but you know I couldn't be sure.'' When he was asked whether he ever saw the individuals on the picket line, he testified ''it was . . . getting dark and I couldn't be positive.'' I find that Carli was unable to identify the individuals as picketers. Accordingly, the allegation is dismissed.

Employee Jeffrey Warren testified that at around 9:30 a.m. on October 20, he was sent to the roof of the plant to locate the source of a leak. As Warren was examining the roof and making measurements, striker and picketer, Michael Schiaraldi Jr., and several other strikers began yelling obscenities at him from the union camper. After a few minutes, rocks began flying up against the roof from the direction of the camper. Warren testified that he could not see who threw the rocks but he saw people in the camper and he saw John Russo in the driver's seat of the camper. Russo testified that he was at the camper at around 8:30 that morning but that he was not there when the rocks were allegedly thrown. Under the applicable legal precedents it is immaterial whether Russo was there at the actual time of the rock throwing. See *Avis*, supra. Under the circumstances, I find that the rock throwing constituted a violation of Section 8(b)(1)(A) of the Act.

c. *Display of gun*

Frank Mangus, a driver, credibly testified that at approximately 11:30 p.m. on July 19 Herbert Schneider started cursing him, saying such things as ''I'm going to send you all home in body bags.'' After about 15 minutes he pulled a gun on Mangus. The police were called and Schneider was arrested. Schneider testified that just prior to the incident he had about 8 to 10 drinks at a bar and that he was under the ''influence of alcohol.'' Mangus credibly testified that at the time of the incident several other picketers were present and they did nothing to stop Schneider. Schneider, who had previously been a union steward and was on the negotiating committee, testified that prior to July 19 he had been on the picket line everyday, but that he has not been on the picket line since that time. He further testified, however, that he has been in the union camper numerous times since July 19.

It is clear that the brandishing of a gun to an employee at a picket line is a coercive act. Cf. *Ford Bros.*, 294 NLRB 107 (1989). Schneider was an individual who had close ties to the Union and who had been a daily picketer. There is no evidence indicating that the Union took any action to reprimand or discipline Schneider for his action. On the contrary, Schneider continued to come to the union camper several times weekly after the incident. I find, therefore, that through Schneider's conduct Respondent violated Section 8(b)(1)(A) of the Act.

d. *Blocking ingress and egress*

Strahle credibly testified that as he was attempting to drive out of the gate around noon on July 29, in the presence of several picketers, two of the picketers blocked his path, pounded on and kicked his car, spat on his car and yelled obscenities at him. The blocking, hitting and kicking of vehicles by pickets are within the parameters of picket line misconduct. See *Carpenters (Reeves, Inc.)*, 281 NLRB 493 fn. 3 (1986); *Laborers Local 721 (Crouse)*, supra, 256 NLRB at 200. This conduct violates the Act despite the fact that Strahle was a manager, since the incident occurred at the picket line in open view of employees, including the other picketers. See *Lumber Workers Local 3171 (Louisiana-Pacific)*, supra at 814 fn. 10.

Several witnesses testified concerning ''Family Day'' which took place on August 31. During that day the Union carried out mass picketing with striking employees and their families. Strahle, Mangus, Michael Schiraldi Sr., and Charles Gagliano testified that between 30 to 60 people gathered at the front gate on the morning of August 31 at the time the trucks were leaving for their deliveries. The crowd consisted of striking and picketing employees, their wives and children and at least one official of the Union, John Russo. The evidence also contains a video tape of the event showing trucks proceeding slowly and pickets standing in front of the trucks. Striking employees and their wives placed themselves and their small children in front of the trucks as they attempted to leave. Security guards were required to surround the trucks and escort them out inch-by-inch in order to avoid injuring any of the picketers or their children. While Russo testified that he told the people to ''keep on moving,'' the evidence shows that the vehicles were blocked. As stated previously, the blocking of vehicles by picketers violates the Act. See *Carpenters (Reeves, Inc.)*, supra at 493. Accord-

ingly, Respondent violated Section 8(b)(1)(A) of the Act ln connection with its activities on ''Family Day.''

e. *Physical threats*

Carli credibly testified that one day during July, as he was returning to the plant, Business Agent Russo said, in the presence of other picketers, ''I was the one that they were supposed to get.'' Russo also said ''they were going to put me in a body bag and send me home and that there was no way I was going to live through the strike.'' I find that this constituted a threat of a serious nature by a union official. It was coercive of employees' rights and violated Section 8(b)(1)(A) of the Act. See *Lumber Workers Local 3171 (Louisiana Pacific)*, supra at 813.

Paragraph 6(i) of the complaint alleges that on August 8 Russo assaulted a security guard in the presence of employees and threatened to shoot a nonstriking employee. Carli credibly testified that on August 8 he heard Russo and Vitta yelling at a security guard and telling him to ''get off the street or they are going to kill him.'' Afterwards Russo reached into the back seat of his vehicle and pulled out what appeared to Carli to be a pickaxe. Carli also testified that Russo pulled out what looked like a pistol and pointed it at him. On cross-examination Carli conceded that it was raining, it was dark and he did not know whether Russo had a pistol. Vitta testified that Russo grabbed the steering wheel lock and proceeded to get out of his vehicle. Similarly, Russo testified that he took the steering wheel bar and got out of the car. With respect to the allegation that Russo threatened to shoot a nonstriking employee, inasmuch as Carli testified that it was dark and raining and he could not tell whether or what Russo had, I find that General Counsel has not proven the allegation. Accordingly, the allegation is dismissed. With respect to the allegation that Russo assaulted a security guard, I find that by Russo's taking the steel bar out of the car he threatened to assault the security guard, in violation of Section 8(b)(1)(A) of the Act.

f. *Spitting at employees*

Employee David Jados credibly testified that on August 8 as he was pulling into the Company's driveway, about 15 or 20 picketers blocked his car, spit at it and kicked it. Carli credibly testified that on August 12, as he was leaving the plant, picketers blocked his truck, pounded on it, and Vitta spit at him. The blocking and kicking of vehicles by pickets constitutes picket line misconduct within the meaning of Section 8(b)(1)(A). Spitting at employees by pickets also violates Section 8(b)(1)(A). See *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168, 178 (1986). Accordingly, I find that Respondent violated Section 8(b)(1)(A) of the Act by the blocking of ingress and egress, the kicking of the car and the spitting at employees.

g. *Recording license numbers and photographing employees*

Jados credibly testified that during the week of August 7 three men from the picket line approached his automobile in the Company parking lot. One of them, who had a pad and pencil and was taking down Jados' license plate number, said to Jados ''we're going to find out where you live and come and get you.'' Jados also credibly testified that during the same week someone on the picket line was using a telephoto lens and photographing employees as they entered and exited the building. Strahle credibly testified that the Union had a video camera stationed across the street from the plant and directed at the main gate for a 4- to 5-week period beginning September 6. This testimony was corroborated by Gagliano and Monroe. I find that photographing of employees by a picketer and recording of license plate numbers by picketers constitutes picket line misconduct in the context of this case. See *Dover Corp.*, supra, 211 NLRB at 958.

h. *Placing nails in front of vehicles*

Jados credibly testified that on August 9 or 10, as he was returning to the plant in a company truck, 20 to 30 picketers stopped him at the gate by blocking his vehicle. After passing through the line, he noticed that a ''jack rock'' (two twisted nails welded together) was embedded in one of the truck's tires and air was leaking from the tire. Although Jados did not see any particular picketer throw the jack rock under the truck, it is reasonable to infer from the strong circumstantial evidence that one of the picketers committed the act. See *Avis*, supra, 280 NLRB at 580 fn. 3; *Dover Corp.*, supra, 211 NLRB at 958. The depositing of nails in such a manner constitutes picket line misconduct, violative of Section 8(b)(1)(A). See *Machinists District 34 (Wolf Machine)*, 254 NLRB 282 (1981).

i. *Damage to vehicles*

Mason credibly testified that on August 14, as he was pulling out of the facility, striking employee Richard Schiraldi stepped out of the union camper and threw a rock at his truck. It caused a 6-inch dent in the upper part of the cab. Mason also credibly testified that on the same day Anthony Yannucci put two dents in his truck with his fist. I find that this activity constituted misconduct within the meaning of Section 8(b)(1)(A) of the Act. See *Lumber Workers Local 3171 (Louisiana-Pacific)*, supra, 274 NLRB at 813–814.

Employee Charles Gagliano credibly testified that on September 13, as he was leaving the facility in a truck with a coworker, a picketer jumped onto the truck and twisted the side-view mirror, so that it was facing the opposite way. This was accompanied by name calling from the picketers. I find that the bending of the mirror constitutes a violation of Section 8(b)(1)(A) of the Act. See *Boilermakers Local 696 (Kargard Co.)*, 196 NLRB 645, 649 (1972).

Paragraph 6(z) of the complaint alleges that on September 14 William Ives inflicted damage on a vehicle operated by a nonstriking employee. Todd Monroe testified that on September 14 Ives, a picketer, twisted and then broke the mirror on his truck. On cross-examination Monroe identified Ives as having a mustache. Ives, however, testified that he never has had a mustache. While I credit Monroe's testimony that a picketer bent and broke the mirror on his truck I believe he was mistaken as to the identity of the picketer. Inasmuch as paragraph 6(z) specifically alleges that Ives inflicted the damage, I find that General Counsel has not proven the allegation and accordingly, the allegation is dismissed.[4]

[4] Inasmuch as I have previously found that the Union violated Sec. 8(b)(1)(A) for damaging vehicles, it is not necessary that I consider whether

Paragraph 6(aa) of the complaint alleges that on September 14 Tudico inflicted or attempted to inflict damage on a vehicle operated by a nonstriking employee. Patrick Mahoney testified that on September 14, as he arrived at the plant, two picketers, John Collins and Sam Tudico, surrounded his car and began pounding on the windows and yelling names at him. Mahoney testified that Tudico ''more or less walked into my vehicle and the rear bumper caught him.'' Tudico testified that the back fender of the truck hit him in the leg causing bruises to his leg and elbow. I find that General Counsel has not shown in this incident that Tudico inflicted or attempted to inflict damage on Mahoney's vehicle. Accordingly, the allegation is dismissed.

j. *Throwing liquid*

Michael Schiraldi Sr., the Company's division manager for Duchess County, credibly testified that on July 8, as he was riding in the passenger seat of a trailertruck, Russo ran up to the truck on the driver's side and threw some kind of liquid from a cup at the driver. The liquid hit the driver in the face. In *Dover Corp.*, supra, 211 NLRB at 958, the throwing of coffee at an employee was found to be picket line misconduct. I find that the throwing of the liquid constitutes picket line misconduct in violation of Section 8(b)(1)(A) of the Act.

k. *Alleged misconduct away from the picket line*

With respect to misconduct occurring away from the picket line, in *Teamsters Local 783 (Coca-Cola)*, 160 NLRB 1776 (1966), the Board affirmed the Judge's decision holding the Union responsible for certain misconduct occurring away from the picket line. The judge's decision stated (at 1779):

> When a union dispatches pickets to follow trucks and the pickets repeatedly engage in violence, the union is legally responsible for the repeated outbreaks if it takes no effective action to curb the perpetrators and continues to dispatch the same individuals on similar picket duty with similar consequences.

In affirming, the Board pointed out that ''our agreement . . . is based on the fact that Respondent, which authorized the strike, knew of the acts of misconduct and violence but took no steps reasonably calculated effectively to stop such acts'' (at 1776). See also *Dairy Employees Local 695 (Yellow Cab)*, 221 NLRB 647, 654 (1975).

(1) Interference with driving

Strahle credibly testified that during July and August Dennis Freeman, a striker, using the union camper as his base of operations, assigned strikers' cars to follow Company trucks. Carli credibly testified that in mid-July, as he was returning on the highway to Newburgh, Yannucci repeatedly drove his car in front of Carli's truck and kept on braking in a manner which almost caused an accident. On his return to the plant, Carli called over to the picketers, which now included Yannucci, and told Yannucci that had he seen a police car he would have reported Yannucci. Russo then came to the fence, told Yannucci not to talk to Carli and told the picketers that Carli was the one ''they were supposed to get.''

Russo was made aware of the incident, yet there is no evidence in the record that Respondent took any steps to stop such acts. Accordingly, pursuant to *Teamsters Local 783*, supra, I find that through Yannucci's conduct Respondent violated Section 8(b)(1)(A) of the Act.

(2) Propelling metal balls

Brian Cutler, a driver for the Company, testified that on August 16 at a Shoprite parking lot in Middletown, someone shot steel balls out of a sling shot while he was unloading the truck. The police were called and Cutler testified that he saw the police take steel ball bearings and a sling shot from Yannucci's vehicle. There is no evidence that the Union knew of or later became aware of the episode. Accordingly, the allegation is dismissed. See *Teamsters Local 783*, supra.

(3) Physical threats

Paragraphs 6(ff) and 6(gg) of the complaint allege that on September 14 and 15, Steve Powles, a striker, threatened to inflict physical injury on a nonstriking employee outside a supermarket in Middletown. Anthony McGregor testified that on September 14, as he was coming out of a Shoprite in Middletown, he saw Powles leafletting outside the Shoprite. McGregor testified that Powles said to him ''get the f__ out of the truck right now big man, I'll kick your f__ ass and f__ kill you.'' McGregor also testified that on September 15, outside of Shoprite in Middletown, Powles said to him ''we know where you live and you'd better watch your ass going home.'' There is no indication that the Union knew of or later became aware of Powles' action. Accordingly, the allegation is dismissed. See *Teamsters Local 783*, supra.

(4) Posthearing evidence

On January 3, 1990, Respondent filed a motion to reopen the hearing to submit evidence concerning dismissals of harassment charges brought against several individuals. On February 13, the hearing was reopened for that limited purpose. Respondent filed certificates from the court clerk of the Newburgh City Court that the harassment charges against Joseph Vitta and John Russo were dismissed and the criminal mischief charge against William Ives was dismissed. In addition, Respondent filed a certificate from the court clerk that the harassment charge against Salvatore Tudico was ''adjourned in contemplation of dismissal for six months to June 18, 1990.'' Presumably Respondent intends by its submission to show that the individuals were not guilty of the charges and that should bear weight in terms of the findings in this proceeding. There is no evidence that the charges were dismissed after a trial. It appears, instead, that the charges against Vitta, Russo and Ives were dismissed because of the failure of the complaining witnesses to attend the criminal hearings.

Rule 803(22) of the Federal Rules of Evidence allows evidence of certain kinds of criminal judgments to be admitted in subsequent criminal or civil proceedings ''to prove any fact essential to sustain the judgment.'' The judgment of conviction must have been entered after trial or have been based on a plea of guilty. Judgments of acquittal, on the other hand, are almost always excluded because of the lack of rel-

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the September 14 incident should constitute a violation if committed by a picketer other than the one identified in the complaint.

evancy since they do not necessarily prove innocence but may indicate only that the prosecution failed to meet its burden of proof beyond a reasonable doubt as to at least one element of the crime. *McKinney v. Galvin*, 701 F.2d 584, 586 fn. 5 (6th Cir. 1983); 4 Weinstein's *Evidence*, § 803(22)[01] at 803–354. Since it appears that the dismissals were not the result of a judgment after a trial and since, in any event, judgments of acquittal are almost always excluded, I believe the dismissals bear no weight in determining whether the individuals were guilty of the misconduct alleged in the complaint. Accordingly, while the certificates of dismissal were admitted into evidence, I have not considered them in determining whether or not the individuals were guilty of the alleged acts of misconduct.

CONCLUSIONS OF LAW

1. At all pertinent times the Company was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union was a labor organization within the meaning of Section 2(5) of the Act.

2. By throwing rocks, displaying a gun, blocking ingress and egress, physically threatening and spitting at employees, recording license numbers and photographing employees, placing nails in front of vehicles, damaging employees' vehicles, throwing liquid at an employee and interfering with an employee's driving away from the picket line, Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act.

3. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any unfair labor practice not specifically found herein.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Scarsdale, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing employees of Pepsi-Cola Newburgh Bottling Company, Inc., in the exercise of their rights under Section 7 of the Act by throwing rocks, displaying guns, blocking ingress and egress, physically threatening and spitting at employees, recording license numbers and photographing employees, placing nails in front of vehicles, damaging employees' vehicles, throwing liquid at employees and dangerously interfering with the driving of employees.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its meeting halls and offices copies of the attached notice marked ''Appendix''[6] Copies of the notices on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver to the Regional Director for Region 2, signed copies of the Appendix for forwarding to Pepsi-Cola Newburgh Bottling Company, Inc., for posting if the company agrees, on all bulletin boards and other places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''